NARAIN SINGH vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Carey, J.) July 1, 1941]

Penal Code (Cap. 45), section 380, Criminal Procedure Code (Cap. 6), section 294—Theft from a building—Sentence—Observations on considerations to be weighed—Magistrate's grounds of decision—Desirability of specifying findings of fact.

Semble, if the charge laid is not one under some special provision of the law whereby the offence is made especially reprehensible it should be punished as an ordinary offence.

Circumstances of aggravation must be properly proved and not merely inferred.

In his grounds of decision it is desirable that a Magistrate should specify his findings of fact particularly when there is disparity between the evidence called by witnesses on the same side.

Cases referred to—

(1) *Rex v. Teo Woo Tin* (1932) 1 M.L.J. 124; (1932) S.S.L.R. 201.

(2) *Public Prosecutor v. Goo Kian* (1939) 8 M.L.J. 291; (1938) F.M.S.L.R. 113.

The facts sufficiently appear from the judgment.

C. D. D. Hogan (with him *Chin Swee Onn*) for appellant.

T. T. Russell, Deputy Public Prosecutor, for respondent.

The facts and arguments sufficiently appear from the Judgment.

Carey, J.—This is an appeal against conviction and sentence by the First Magistrate, Ipoh, on a charge of theft of five tins of petrol contrary to section 380 of the Penal Code.

The appellant was the owner-driver of the car in which four of the five tins were placed in order to be taken away.

Early in his address, on arguing of the appeal, Mr. Hogan for the appellant stated that the only matter in issue was the question of the parking of the car at the time alleged by the first witness for the prosecution. Otherwise the evidence of that witness and the appellant agreed.

The learned Magistrate obviously appreciated that if the appellant was at or near the scene of the theft at the times alleged by the first witness for the prosecution his story could not be true and his presence there would be difficult to explain. The appellant denied being there until "round about 9 p.m." The Magistrate believed the first witness for the prosecution and did not believe the appellant.

There was ample evidence on which the learned Magistrate could come to the conclusion he did as to the guilt of accused. In spite of Mr. Hogan's very able argument I am not persuaded that there is any ground for interfering with that decision.

As regards sentence however it is argued, and I think rightly, that the reasons given therefor by the learned Magistrate are not well founded. He said in his grounds of judgment on the subject of sentence:

"If this had been a case of ordinary theft I would doubtless have given the 4th accused, in view of his good record, the benefit of section 294 of the Criminal Procedure Code and bound him over as a first offender but I considered a severe sentence was necessary in this case. At a time when all communities are generously subscribing to the War Fund and when the public is being taxed on its income and in many other ways to provide the sinews of war, acts calculated to nullify this effort must be regarded as highly reprehensible. Moreover it is very necessary at the present time to see that the Army stores are not in any way interferred with. It is clear that this particular petrol store had already been subject to losses by theft as otherwise the trap would not have been set. Therefore not only a severe sentence but a deterrent sentence also seemed in my opinion to be required."

I venture to think that this is a case of ordinary theft. The charge was not laid under any special provision of the law whereby the theft of Army stores is made especially reprehensible. Also there is no proof that the learned Magistrate's deduction as to previous losses of petrol by theft from the same store is correct. His reasoning on this point is unsound, for it may have been that advance information as to this particular theft being about to take place was responsible for the setting of the trap.

I think therefore, having regard to the judgment of Murison, C.J., in the case of *Rex v. Teo Woo Tin*[1], I should give effect to the inclination of the learned Magistrate to give the appellant the benefit of section 294 of the Criminal Procedure Code and bind him over.

This case is of a very different nature to that of *Public Prosecutor v. Goo Kian*[2] wherein the accused "was found technically guilty of theft" and which Mr. Hogan asks me to follow by not recording a conviction and binding over the appellant.

The conviction of the appellant is upheld but the sentence is set aside and in place thereof it is ordered that he be released on his entering into a bond with one surety to appear and receive judgment if and

when called upon within the period of two years and in the meantime to keep the peace and be of good behaviour, such bond to be conditioned in the sum of $250.

There is just one thing more I would like to add, it is most desirable that in their grounds of judgment magistrates should set out specifically their findings of fact and particularly is this so when there is disparity in the evidence given by witnesses called by the one party.

Conviction confirmed.

Sentence varied.